In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-768

CLARENCE BROWN, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a) is not reported. The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 507 F.2d 1300.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1974. The petition for a writ of certiorari was filed on December 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's complaint was properly dismissed for failure to exhaust administrative remedies.

STATEMENT

Petitioner, a black employee of the General Services Administration, filed an administrative complaint on July 15, 1971, alleging that he had been denied a promotion on the basis of race. After preparation and review of an investigative report, a Regional Administrator notified petitioner that there was no evidence of racial discrimination. Petitioner requested a hearing before a complaints examiner of the Civil Service Commission. The examiner, however, found no evidence of discrimination and recommended that no action be taken on the basis of petitioner's complaint.

On March 23, 1973, the General Services Administration issued its final decision determining that the evidence did not support petitioner's complaint of racial discrimination. On March 26, 1973, petitioner received written notification of that decision, together with a copy of the transcript of the hearing and the findings and recommended decision of the complaints examiner. The letter of notification advised petitioner that he could appeal the decision to the Civil Service Commission or challenge it by commencing an action in federal district court within 30 days of receipt of the letter under Section 717(c) of the Civil Rights Act of 1964, as added, 86 Stat. 112, 42 U.S.C. (Supp. III) 2000e-16(c).

Petitioner did not appeal to the Civil Service Commission and did not commence an action in federal district court within 30 days (Pet. 5; Pet. App. 6a).

On May 7, 1973—42 days after he received notice of GSA's final decision—petitioner filed a complaint in the district court seeking "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay" (Pet. App. 6a). The district court's jurisdiction was alleged to be invoked under Title VII of

the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, 28 U.S.C. 1331 (federal question), the Equal Employment Opportunity Act of 1972 "with particular reference to §717 of the 1972 Act, covering discrimination in federal employment" (Complaint, p. 1), the Declaratory Judgment Act, 28 U.S.C. 2201, *et seq.*, and 42 U.S.C. 1981 (Pet. App. 6a).[1]

Respondents moved to dismiss the complaint for lack of subject matter jurisdiction, on the ground that petitioner had not filed his complaint within 30 days of receipt of notice of the agency's final decision, as required by Section 717(c) (Pet. App. 7a). The district court granted the motion to dismiss (Pet. App. 1a).

The court of appeals affirmed. It held first that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances. This remedy, the court held, is retroactively available to any federal employee, such as petitioner, whose administrative complaint was pending at the time Section 717(c) became effective on March 24, 1972. Petitioner's complaint, however, was untimely under Section 717(c) and therefore was properly dismissed (Pet. App. 11a-15a). The court stated (Pet. App. 13a; footnote omitted):

> We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument,

---

[1]Petitioner's motion to amend his complaint by alleging additional bases of jurisdiction under 28 U.S.C. 1343(4) and the Tucker Act, 28 U.S.C. 1346(a)(2), and by adding an allegation that more than $10,000 was in controversy, was denied by the district court (Pet. App. 7a). The court of appeals did not review the denial of this motion, and petitioner does not seek review of the denial in this Court (Pet. 2).

particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it. In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since we hold below that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

Alternatively, the court held that even if Section 717(c) were not the exclusive remedy and petitioner were not bound by the 30-day filing requirement, the complaint was properly dismissed because petitioner inexcusably failed to exhaust his administrative remedies by appealing GSA's final decision to the Civil Service Commission, as provided by 5 C.F.R. 713.231 (Pet. App. 16a-17a). The court stated (*ibid.*):

For aught that appears in the record before us, we cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. * * *

Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. * * * Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. §713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated. * * *

Under the circumstances of this case, we hold that Brown inexcusably failed to exhaust available administrative remedies.

ARGUMENT

Petitioner does not contend that his complaint was timely filed under Section 717(c) or that the Section should not have been given retroactive application to his claim. He argues instead (Pet. 7-13) that the right of action created by Section 717(c) is not exclusive and that a federal employee alleging employment discrimination has available "a variety of overlapping [judicial] remedies" (Pet. 7). Although the court of appeals rejected that contention, this Court need not consider the issue in this case. Even if those "overlapping" judicial remedies might otherwise be available to a federal employee, petitioner is in no position to invoke them because he failed to exhaust his administrative remedies.

The Civil Service Commission's regulations governing equal employment opportunity, 5 C.F.R. Part 713, provide that a complainant who is not satisfied with the final decision of his employing agency may appeal that decision to the Commission. 5 C.F.R. 713.231-713.236. The Commission's Board of Appeals and Review must review the complaint filed and "issue a written decision setting forth its reasons for the decision" (5 C.F.R. 713.234). If it finds that the complainant was discriminated against and was denied an employment benefit as a result of the discrimination, the Commission is empowered to grant broad remedial relief, including retroactive promotion with back pay. 5 C.F.R. 713.271(b).

Petitioner's failure to appeal to the Civil Service Commission is fatal to his complaint in this case. There is no justification for petitioner's "premature interruption of the administrative process" (*McKart* v. *United States*, 395

U.S. 185, 193), a process that could have culminated in an agency order granting him the basic relief he sought in the district court. "[P]ractical notions of judicial efficiency" and "administrative autonomy" (*id.* at 195) preclude resort to the courts until such administrative remedies are exhausted.

It is true that Section 717(c) relaxes the usual exhaustion requirement to the extent of permitting a federal employee to bring a civil action within 30 days after he receives notice of his employing agency's final decision, without requiring him to pursue an appeal to the Civil Service Commission. But that provision does not reflect a general congressional policy that "it would be unfair to require [federal] employees to file an appeal with the Board of Appeals and Review" (Pet. 17). Section 717(c) is narrowly tailored to excuse normal exhaustion requirements if, *but only if*, the employee brings a civil action within 30 days.

In terms, Section 717(c) authorizes suit only under Section 706 of the 1964 Act (see Pet. 3). Petitioner's argument is premised on the contentions that that authorization did not supplant alternative pre-existing remedies and that the timely filing of a suit under Section 717(c) also serves to eliminate the need for further exhaustion of administrative remedies before those alternative grounds for relief can be asserted in the courts. But even if petitioner is correct in those contentions, there is no basis for his necessary further contention that a failure to comply with Section 717(c) somehow also serves to excuse petitioner from complying with normal exhaustion of administrative remedies requirements before seeking relief in the courts under other statutes that do not, like Section 717(c), include any modification of the normal exhaustion requirements.

Since petitioner neither brought his action within the 30-day period prescribed by Section 717(c) nor filed an appeal with the Civil Service Commission, his complaint was properly dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

ROBERT E. KOPP,
NEIL H. KOSLOWE,
Attorneys.

APRIL 1975.